v. Banning[11] is an attachment case under the Practice Act,[12] which did not allow attachments if a lien or pledge existed. The attachment in that case, after an affidavit that no security existed, was clearly inconsistent with the retention of the carrier's lien in question. Jacobs v. Latour[13] is also the case of a detention, not a pledge-lien. The authorities cited by Jones on Pledges as supporting a waiver by the creditor are in part detention-lien cases, which from their very nature cannot be taken as authority for pledge-lien cases, and, in part, cases of common-law mortgages. As to the latter, it is clearly inconsistent from a technical viewpoint for the mortgagee, as owner, to attach the property as belonging to the mortgagor. In the case of lien mortgages, the majority of cases hold that the mortgagee does not waive his lien by levying on the mortgaged property,[14] and for the purpose of securing justice, the same rule should apply to common-law mortgages. True, the title passes, but it passes only for the limited purpose of security, and, if the mortgagee can achieve the common intention of realizing upon his security by levying, he should be permitted to do so.

Dicta in certain Iowa cases, quoted by Jones, seem to agree with the California decisions, but these have been limited by a later decision of the Iowa court to cases of detention-liens.[15] The earlier Iowa cases have been adversely criticized[16] and have been followed but once,[17] and in this instance, the point was barely touched upon. There are several cases contra to the California holding.[18]

S. M. A.

PROPERTY: ALLUVION: RIGHT OF UPLAND OWNER TO ACCRETIONS FROM THE OCEAN.—In the case of *Strand Improvement Company v. City of Long Beach*[1] the Supreme Court seems to have settled in favor of the upland owner the California law upon the interesting question whether additions by accretion to land abutting on the ocean belong to the upland owner or to the state.

---

[11] Supra, n. 10.

[12] Cf. Cal. Code Civ. Proc., §§ 537-8.

[13] Supra, n. 10.

[14] Case Co. v. Rice (1913), 152 Wis. 8, 139 N. W. 445; Stein v. Mc Auley, supra, n. 1; Madson v. Rutten (1907), 16 N. D. 281, 113 N. W. 872, 13 L. R. A. (N. S.) 554; Bank v. Mottin (1891), 47 Kan. 455, 28 Pac. 200. This question cannot arise in California unless § 726 of the Code of Civil Procedure be waived. See Martin v. Becker (1915), 169 Cal. 301, 305, 146 Pac. 665, 667 and 3 California Law Review, 427.

[15] Stein v. McAuley limiting Bank v. Dows and Lawrence v. McKenzie, supra, n. 1.

[16] Wiggin v. Mankin, supra, n. 5.

[17] Claflin v. Bretzfelder (1901), 69 Ark. 271, 62 S. W. 905.

[18] Jones v. Scott (1872), 10 Kan. 33; Arendale v. Morgan, supra, n. 4; Guenther v. Cary (1896), 17 Ky. L. Rep. 1262, 34 S. W. 232. See also Lincoln v. Linde (1891), 27 Abb. N. C. 278, 16 N. Y. Supp. 106.

[1] (Dec. 9, 1916), 52 Cal. Dec. 616, 161 Pac. 975.

According to the civil law, the land which a river adds to a field by alluvion was acquired by the owner of the field.[2] But since no man could own the seashore below the highest point reached by the waves in the winter storms,[3] the property in land gradually added by the sea did not vest in the upland owner.[4]

The common law rule was otherwise, and land gained from the sea, by small and imperceptible degrees, either by alluvion, by the washing up of sand and earth so as in time to make terra firma, or by dereliction, as where the sea shrinks below the usual water marks, went to the owner of the land adjoining.[5]

In California the law has been confused by section 1014 of the Civil Code which provides that in the case of rivers and streams where land forms from natural causes by imperceptible degrees it belongs to the owner of the bank. This section, the United States Circuit Court of Appeals has regarded as covering the whole subject of accretion, and, applying the maxim, *"expressio unius"* and section 4 of the Civil Code declaring that "The rule of the common law that statutes in derogation thereof are to be strictly construed, has no application to this code," has decided that it abrogates the common law of alluvion as applied to the seashore.[6]

This reversion to the civil law rule is based upon a mistaken application of the rules of code construction. California by express enactment in 1850 adopted the common law, and it is a cardinal rule of interpretation that the common law continues, except as altered by the statute.[7] The common law of alluvion as to the seashore is not touched upon by section 1014, and should therefore continue.

The common law is clearly the wiser and more just rule. Many reasons have been assigned for its existence—Blackstone explains it on the ground that such gains are too trifling for the law to regard, and on the further ground that as the owners of the seashore are often losers by the breaking in of the sea, or at charges to keep it out, this possible gain is a reciprocal compensation for such possible charge or loss.[8] Lord Hale rests his explanation on the basis of the maxim *"idem est non esse et non apparere,"* and this being the reason for the rule, it has been claimed that the right to alluvion ought only to be given when no definite bound-

---

[2] Institutes, 2, 1:20; Gaius, 2:70.
[3] Institutes, 2, 1, 5; Institutes, 2, 1, 3.
[4] French Civil Code, § 538; Zeller v. Southern Yacht Club (1882), 34 La. Ann. 837.
[5] 2 Bl. Com. 262; Dana v. Jackson St. Wharf Co. (1866), 31 Cal. 118, 89 Am. Dec. 164; Wright v. Seymour (1886), 69 Cal. 122, 10 Pac. 323.
[6] Western Pac. Ry. Co. v. Southern Pac. Co. (1907), 151 Fed. 376.
[7] Sharon v. Sharon (1888), 75 Cal. 1, 13, 16 Pac. 345.
[8] 2 Bl. Com. 262.

aries formerly existed.[9] It is, moreover, only fair and just that an owner should not be cut off from the shore to which he has formerly had approach. Whichever reason is the correct one, they all attest the value of the common law rule, and it is fortunate that the Supreme Court has seen fit in the principal case to maintain our law in accordance with it.

J. F. R.

RESTRAINTS ON ALIENATION: CHOSES IN ACTION.—Is a provision in a contract that one of the parties thereto shall not "assign any of the moneys payable under the contract or his claim thereto" without the consent of the other party, valid? Certainly this provision does not suspend "the absolute power of alienation" in violation of sections 715, 716, of the Civil Code,[1] for it allows the debt to be assigned with the debtor's consent, and the absolute power of alienation is not suspended when there are persons in being who can by their united efforts convey an absolute interest in possession.[2]

But is this provision a condition restraining alienation, which is repugnant to the interest created, and therefore void under section 711 of the Civil Code?[3] *Portuguese-American Bank of San Francisco v. Welles*[4] involved a construction contract between the City of San Francisco and a contractor which contained such a provision. In violation of this provision the contractor assigned a payment which had become due to him under the contract. The court held that, in the absence of complaint by the city, the assignment was valid as between the assignee and a creditor of the contractor.

That a provision against the assignment of a debt is a "condition restraining alienation" is clear; but is it "repugnant to the interest created?" It cannot be doubted that choses in action are within the general terms of section 711, for it is in that division of the Code which deals with property in general, and the Code recognizes the right of property in an obligation.[5] It may be urged, however, that section 711 is merely a re-enactment of the common law rules, that alienability is an essential attribute of certain interests in property, that to deprive such interests of the quality of alienability would be to create interests unknown to the common law, and that such interests cannot be created: that therefore the test of a condition's repugnancy to the interest created is the common law definition of such interest; and that

[9] Attorney-General v. Chambers (1895), 4 DeG. & J. 55, 45 Eng. Rep. R. 22; Hale, De Juris Maris, Chap. VI, II.

[1] Cal. Civ. Code, §§ 715, 716.

[2] Cal. Civ. Code, § 716; Toland v. Toland (1898), 123 Cal. 140, 55 Pac. 681; Blakeman v. Miller (1902), 136 Cal. 138, 68 Pac. 587.

[3] Cal. Civ. Code, § 711.

[4] (Nov. 13, 1916), 37 Sup. Ct. Rep. 3.

[5] Cal. Civ. Code, §§ 655, 1458.